IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

NO. 87-2123

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
an agency of the State of Florida,

Petitioner,

v.

MID-FLORIDA GROWERS, INC. and
HIMROD & HIMROD CITRUS NURSERY,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA**

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

FLORIDA, IDAHO, LOUISIANA, MISSISSIPPI,
OKLAHOMA, SOUTH DAKOTA, TENNESSEE,
VERMONT, VIRGINIA AND WYOMING

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INTEREST OF AMICI

Amici respectfully file this brief in support of the petition for writ of certiorari and pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

The states which have joined as amici curiae in this case exercise a broad range of regulatory powers within their respective jurisdictions. Under the police power, every state must at times take swift and uncompromising measures to combat the spread of disease or to prevent its occurrence. Such measures have historically included the destruction of property suspected of being diseased or capable of transmitting disease or the discontinuance of certain uses of property which may be injurious to the public health, safety and welfare. Historically, too, the law of the land has been that government owed no compensation to the property owner for the taking of such action.

In this respect, this Court has observed that the police power is "one of the most essential powers of government, one that is the least limitable." Hadacheck v. Los Angeles, 239 U.S. 394, 410 (1915).

The decision of the Florida Supreme Court in Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988), nullifies this Court's decision in Miller v. Schoene, 276 U.S. 272 (1928). In so doing it imposes an unprecedented limitation upon the exercise of the State's police power. The Florida Supreme Court holds the State must pay compensation for the destruction of young citrus trees which had been exposed to the disease known as citrus canker and which the State, relying on scientific opinion, believed capable of harboring and further spreading the disease. As noted in the petition for certiorari, the potential

liability of the State in this and similar cases now reaches into the hundreds of millions of dollars. (Petition at 18)

If the decision below is allowed to stand, it will deny effect to Miller v. Schoene and seriously inhibit the State in exercising its "most essential power" in the area most vital to the health of its citizens and industry.

Because Miller v. Schoene deals specifically with uncompensated destruction of property pursuant to the police power to protect a state's dominant agricultural industry, clarification by this Court of its continuing precedential validity is essential to guide Florida and other amici states in taking like actions, particularly actions (as the one here) in concert with and under the

direction of an agency of the United States Government.[1/]

[1/] The United States Department of Agriculture led the decision to destroy trees in this case and in the entire canker eradication program pursuant to its statutory authority in Title 7 U.S.C. §147a et seq. See, e.g. 49 Fed. Reg. 41, 268 (Oct. 22, 1984); 49 Fed.Reg. 36, 623 (Sept. 19, 1984). As such, this Court may desire that the Solicitor General of the United States express his views on the impact of the decision below on the continuing validity of Miller v. Schoene and the impact of the decision below on joint federal-state eradication programs. See, generally, Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, June 30, 1988 (_____ Fed. Reg. ____).

SUMMARY OF ARGUMENT

Acting under the police power, States may require the destruction or prohibit the use of property found injurious to the public health, welfare and safety. As long as the object of state action is to protect the public welfare, and the action itself is not unreasonable or arbitrary, no compensation is due the owner of the property under the Takings Clause. In this case, Florida acted to control the spread of citrus canker by destroying young nursery trees which had been exposed to the disease and which were believed capable of harboring and spreading the disease. On these facts, and in the absence of any conclusion that the State's action was arbitrary or unreasonable, the Florida Supreme Court found a "taking." The decision ignores, and thus implicitly overrules in Florida, this Court's decision in Miller v. Schoene, supra. Because Miller v. Schoene

upheld the constitutionality of a statute identical in effect to the one here at issue, clarification by this Court of Miller v. Schoene's continuing precedential validity is essential to guide governments in responding to similar emergency conditions which such governments have statutorily determined to create an unacceptable risk to public health and safety or a major economic resource.

ARGUMENT

I. THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH MILLER V. SCHOENE AUTHORIZING THE UNCOMPENSATED DESTRUCTION OF NUISANCE PROPERTY UNDER THE POLICE POWER.

The decision of the Florida Supreme Court effectively nullifies the landmark decision of the Court in Miller v. Schoene,

supra.[2] In Miller the Court considered the constitutionality of a Virginia statute which mandated the uncompensated destruction of any cedar tree "which is or may be the source . . . of the communicable plant disease known as cedar rust." 276 U.S. at 277. Cedar rust disease, although not harmful to cedar trees themselves, could be destructive to the fruit and foliage of the apple tree, a principal agricultural industry of Virginia. 276 U.S. at 278-279.

This case involves a Florida statute identical in effect which mandated the destruction of plants "capable of harboring plant pests . . . reasonably exposed to

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[2] The Florida Supreme Court did not cite Miller v. Schoene in its decision; however, it was presented and briefed to the court. Initial Brief of Petitioner at 14-15; Respondents' Answer Brief at 27.

infestation" and regulations thereunder which provided for eradication of plants "subjected to infestation or infection." Florida Statute 581.031(17) (1983);[3] Florida Administrative Code, Emergency Rule

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[3]Section 581.031(17), Florida Statutes (1983), granted the state Department of Agriculture and Consumer Services the power:

> (17) To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles capable of harboring plant pests or noxious weeds, if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were reasonably exposed to infestation, when necessary to prevent or control the dissemination of plant pests or noxious weeds or to eradicate same and to make rules therefor. (Emphasis added.)

5 BER84-9 (effective Sept. 21, 1984) (Citrus Canker Eradication).

This Court in Miller v. Schoene unanimously held that the State did not exceed its constitutional powers by deciding to destroy one class of property (healthy cedar trees) in order to save another which, in the judgment of the Virginia legislature, was of greater value to the public (apple trees).[4/] As Justice (later Chief Justice) Stone explained for the Court: "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing

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[4/] The Virginia statute at issue in Miller v. Schoene provided for uncompensated takings. The Florida law here at issue permitted limited compensation.

characteristics of every exercise of the police power which affects property." 276 U.S. at 280, (case citations omitted). In other words, the Court held the State may destroy trees without regard to whether they are in fact infected or healthy where the public interest is served. "The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards." 276 U.S. at 278-79 (emphasis supplied).

A. The Florida Statutory and Regulatory Framework Closely Parallels the Virginia Statute in Miller v. Schoene.

Florida's actions, now held to be an unconstitutional taking, were completely consistent with the facts and rationale of Miller. Florida responded to the discovery of the presence of citrus canker in the

State in 1984 under authority of sections 570.07(21) and 581.031(6), (7) and (17), Florida Statutes (1983). (See Appendix to Petition for Certiorari at A 22 et seq.) These statutes authorized the Florida Department of Agriculture and Consumer Services to, inter alia, declare an emergency, to adopt rules and regulations effective during the emergency, to declare a plant pest or plants infested by a pest to be a nuisance, and to quarantine or destroy property affected by plant pests.

Florida's Department of Agriculture and Consumer Services accordingly adopted emergency rules practically indistinguishable from the Virginia statute at issue in Miller. The rules declared citrus canker to be a plant pest and a public nuisance and required the destruction of both infected plants and "suspect" plants. A "suspect citrus canker infested or infected

plant" was defined to include a plant which had been subjected to infection by its presence in an infested area or which had been removed from an infested area within a specified time period. (Appendix to Petition for Certiorari, A 40). Thus, like the Virginia law prohibiting the keeping of cedar trees which "are or may be" a source of cedar rust, Florida required the destruction of citrus trees which were known to have been exposed to citrus canker.

B. Nevertheless, Actions Taken Directly Pursuant to The Florida Statutory and Regulatory Framework Were Held, Contrary to Miller v. Schoene, To Be An Unconstitutional Taking.

Pursuant to the rules and emergency orders issued by the Department, the respondent citrus nurseries were required to burn nursery stock which they had obtained

from Ward's Nursery, where the citrus canker had been discovered. In ordering the destruction of nursery stock that had been exposed to the canker disease, Florida was acting on the best available scientific information. Destruction of these trees to prevent the spread of the disease was recommended by the Citrus Canker Technical Advisory Committee, a group established jointly by the United States Department of Agriculture and the Florida Department of Agriculture and Consumer Services. At trial, plaintiffs' own expert witness, who was a member of this committee, admitted that he had recommended and voted in favor of destroying exposed trees. The State's witnesses testified that the State's actions were based on the assumption that it was dealing with a very severe form of citrus canker. Available scientific literature indicated that the citrus canker

bacteria could "lay dormant" on a plant for eighteen months and perhaps up to three years.

The exposed nursery stock belonging to Mid-Florida Growers and to Himrod & Himrod manifested no sign of the disease before it was burned in October 1984. While stating that "Defendant's [the State's] actions with respect to Plaintiffs' nursery stock were within its police power," the trial court held the State liable for a taking, reasoning that:

> The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the legal [sic] conclusion that no citrus canker was presented. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking

> has occurred in this instance and Plaintiffs are entitled to full and just compensation.

521 So.2d at 102. Thus, ignoring the testimony that the State had relied on scientific opinion holding that destruction of exposed nursery stock was necessary to halt the spread of canker, the trial court in effect ruled that the State could not constitutionally destroy stock it could not prove was diseased.

Upon review, both the Second District Court of Appeal and the Florida Supreme Court found that the State had validly exercised its police power. Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 505 So.2d 592, 595 (Fla. 2d DCA 1987), and Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. 521 So.2d 101, 103 (Fla. 1988). Nevertheless, both the "taking" finding and its rationale were affirmed.

The Florida Supreme Court explicitly sanctioned the trial court's ruling in stating:

> [W]e hold that full and just compensation is required when the state, pursuant to its police power, destroys healthy trees. Because a taking occurred in the instant case when the healthy trees were destroyed, the nursery owners must be compensated.

The Chief Justice of the Florida Supreme Court dissented, reasoning that:

> [A] review of the department's actions should not be made on hindsight. The department had the duty to take emergency measures to prevent an immediate harm--the spread of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this

> light the evidence fails to support a claim for inverse condemnation.

521 So.2d at 105-106, McDonald, Chief Justice, dissenting.

The Chief Justice's dissent is completely consonant with Miller v. Schoene and the analysis this Court has historically applied to nuisance cases.[5/] Neither the trial court, the Second District Court of Appeal nor the Florida Supreme Court found that the destruction of the exposed trees was either unnecessary or an unreasonable, arbitrary means of controlling the spread of citrus canker.

[5/] The decisions of this Court have repeatedly emphasized the judicial deference due a state's determination that certain conditions or certain property constitute a public nuisance. See Mugler, supra, 123 U.S. at 669; Reinman v. Little Rock, supra, 237 U.S. at 176-177; and Powell v. Pennsylvania, 127 U.S. 678, 685-686 (1888).

In fact, it does not differ in character from the destruction of property to contain a fire or pestilence or the destruction of cedar trees to prevent the spread of a fungus to apple trees.[6/] Florida chose to destroy one class of property to preserve another, a permissible constitutional choice according to the express language of Miller, supra. "[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the

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6/ See also Slocum v. United States, 515 F.2d 237 (5th Cir. 1975), upholding an order of the U.S. Department of Agriculture requiring destruction of birds infected with or exposed to VVND, a communicable avian disease.

police power which affects property." Miller v. Schoene, 276 U.S. 279-280.

Moreover, no court found faulty the State's methodology for determining which young trees had been exposed to the canker. The plaintiff nurseries attacked neither the Florida law empowering the Department to act nor the emergency rules the Department adopted for the control of canker. Indeed, all three courts judging this case found the State had properly exercised its police power.[7] To find a taking on these facts directly conflicts

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[7] As the Chief Justice's dissent points out, two Florida district courts of appeal had upheld the constitutionality of the rule authorizing the destruction of healthy but suspect citrus plants. See, Denney v. Connor, 462 So.2d 534 (Fla. 1st DCA 1985), and Nordmann v. Florida Department of Agriculture and Consumer Services, 473 So.2d 278 (Fla. 5th DCA 1985), cited at 521 So.2d 106.

not only with this Court's holding in Miller v. Schoene, but also with Mugler v. Kansas, 123 U.S. 623 (1887), wherein the Court ruled that property may be destroyed or its use prohibited

> for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, [and such] cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit . . . .

123 U.S. at 669.[8/]

[8/] See also, Reinman v. Little Rock, 237 U.S. 171 (1915) (prohibition of livery stables deemed "productive of disease" within certain areas of the city); Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (prohibition of brickyard within city limits); Sligh v. Kirkwood, 237 U.S. 52, 59 (1915) ("The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established.").

II. BECAUSE MILLER V. SCHOENE HAS BEEN RECOGNIZED AS A LEADING "TAKING" DECISION OF THIS COURT, IMMEDIATE REVIEW IS ESSENTIAL TO CLARIFY ITS PRECEDENTIAL VALIDITY.

Prior to the decision below, Miller v. Schoene has been uniformly followed as the definitive determination that states may take reasonable measures to prevent unacceptable risks to public health and safety or a major economic resource. Just last year, this Court again cited Miller v. Schoene with approval in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. ____, 107 S.Ct. 1232 (1987) ("it was clear that the state's exercise of its power to prevent impending danger was justified, and did not require compensation"). 480 U.S. at 107. Also last year the rule of Miller v. Schoene was again applied to measures to prevent the dissemination of plant and animal diseases without having to provide compensation.

See, e.g., Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 915 (3rd Cir. 1987) ("The opinion of the Court [in Keystone] strongly reasserted the authority of cases such as Miller v. Schoene . . . recognizing government police power over property which could, because of disease, cause harm to others") (emphasis added); see also Julius Goldman's Egg City v. United States, 556 F.2d 1096, 1101 n.5 (Cl.Ct. 1977) ("Nor does claimant contend that it is entitled to just compensation in the constitutional sense. It is certainly doubtful that such a claim would stand. See, Miller v. Schoene . . . upholding the destruction, without just compensation, of cedar trees passing on a communicable plant disease").

The election of the Florida Supreme Court to ignore this continuous line of authority requires this Court's careful consideration as to the need for its

intervention to maintain the precedential validity of Miller v. Schoene. Little more can be done under the decision below to combat the spread of disease than destroy sources proven to be infected. A suspected source must be within a state's reach without incurring incalculable compensation for private loss. In fact, by acting promptly to destroy a suspect source, the State forfeits the opportunity to ever prove the source infected. The Second District Court of Appeal seemed to recognize the dilemma posed by young nursery trees exposed to the disease:

> We understand the difficulties the state faces in confronting citrus canker. Canker, unlike spreading decline, is a particularly resilient disease which may be spread by both natural and artificial means and which may lay dormant in healthy plants for some months before manifesting signs of the disease. We understand the difficulties in determining whether

> canker is present in healthy trees. (Emphasis added.)

Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 505 So.2d 592, 595 (Fla. 2d DCA 1987). Apparently, though not explicitly stated, the only constitutional course of action the court thought open to the State in attempting to control a disease which may remain dormant for months was to attempt to monitor the condition of the many millions of young trees that had been exposed to the canker disease. The impossibility of continually inspecting and testing that number of trees over eighteen months or more is obvious. Moreover, federal authority in this State holds that the State may be liable for a taking by failing to take adequate action to prevent the exposure of the state citrus industry to the canker disease. Florida Growers Association v. United States Department of Agriculture,

554 F. Supp. 633 (S.D. Fla. 1982). These contrary state and federal holdings place Florida in a dilemma that only this Court can resolve.

A productive and healthy citrus industry is vital to Florida. In acting to eradicate a dangerous and virulent disease, whether plant or animal, prompt action may mean the difference between success and failure. Agencies charged by law with the responsibility to control and eliminate infectious diseases must be permitted to take reasonable and prompt action. Compensation for the destruction of nursery plants exposed to citrus canker disease should not be constitutionally compelled unless it can be shown that the "real object [of destruction] is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of

law." Mugler, supra, at 669; or that the action is an unreasonable and arbitrary exercise of the power of regulation. Reinman, supra, at 177.

As the record of this case will show, the plaintiff nurseries, Mid-Florida Growers and Himrod & Himrod, did not even attempt to make such a showing. They are not, therefore, constitutionally entitled to compensation.

CONCLUSION

The decision of the Florida Supreme Court conflicts directly with decisions of this Court. As such, it is a marked departure from established case law recognizing the power of the state to protect the public health, safety and welfare and a constitutionally unwarranted restraint upon the exercise of that power. Curtailing the power of the state to fight disease threatens the livelihood

and perhaps ultimately the lives of the State's citizens. The amici curiae join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Florida Supreme Court.

Respectfully submitted,

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